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No. 141

# In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES, PETITIONER

*v.*

FACTORS & FINANCE COMPANY

*ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS*

**REPLY BRIEF FOR THE UNITED STATES**

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## REPLY BRIEF FOR THE UNITED STATES

Counsel for respondent have filed, by leave of Court, a Supplemental Brief discussing in detail certain Regulations, Treasury Decisions, law opinions and other administrative rulings which, they contend, disclose that it has been the long-continued practice of the Bureau of Internal Revenue to accept, after the expiration of the statutory period of limitation, amendments to refund claims timely filed, even though such amendments assert new grounds for refund not set forth in the original claims. We disagree with respondent's interpretation of the various rulings referred to in its Supplemental Brief.

It has been the consistent practice of the Bureau of Internal Revenue to permit the amendment of refund claims after the expiration of the statutory period for filing original claims only when the amendment (1) relates to the same ground previously asserted in a written claim filed within time, or (2) has for its purpose the correction of a purely formal defect in the original claim. The Commissioner has recognized as sufficient and proper claims for refund, subject to amendment, amplification, or perfection, only those claims which had been timely filed and which set forth with reasonable clarity, either in express language or by appropriate reference to another document already on file or to one attached to the claim itself, some ground or reason for the recovery of the disputed tax. We are advised by the Commissioner of Internal Revenue that for many years no exception has been authorized and no amendment permitted after the bar of the statute of limitations that would operate to set up a new and different ground, reason, or cause. (See letter, Appendix C, *infra.*)

All of the rulings of the Commissioner of Internal Revenue to which the respondent refers support our statement of what has been the consistent departmental practice.

*Treasury Decision 3240,* printed as Appendix A, *infra,* sets forth clearly conditions under which the Bureau of Internal Revenue would consent to reopen a case that had previously been finally settled

and closed under its customary administrative practice. It extended to taxpayers, whose cases had been closed, the privilege of securing reconsideration of their claims only "(1) where a showing is made of new and material facts, accompanied by an explanation, satisfactory to the Commissioner of Internal Revenue, of the failure to produce such facts prior to the closing of the case, or (2) where the case is materially affected by the change of regulations or by the final decision of another case either by the Commissioner of Internal Revenue or by a court of competent jurisdiction."

This Treasury Decision expressly did not modify the existing regulations relative to the filing of claims for refund. It stated clearly the conditions under which a case might be reopened, but did not express any intent to permit the presentation of a new ground for refund, different from that previously acted upon under the guise of an amendment to the original claim.

*Law Opinion 1116,* III–1 Cumulative Bulletin 350 (1924), squarely supports our argument in the instant case and holds that a refund claim timely filed can not be "amended" after the expiration of the statutory period for filing a new claim to include a new ground for refund different from those stated in the original claim. Amendment was, however, permitted after the statute had run with respect to a claim which was filed in time but defective in form.

*General Counsel's Memorandum 602,* V–2 Cumulative Bulletin 97 (1926), permitted an amendment of a claim for refund timely filed and defective in form only in that the claimant, an attorney in fact, neglected to attach to the refund claim a copy of his power of attorney, as was expressly required by the applicable regulations. This omission was considered to have been cured by the filing, out of time, by the taxpayer himself of a later and perfected claim.

*Treasury Decision 4265,* printed as Appendix B, *infra,* promulgated March 27, 1929, concisely stated the same principles as had theretofore been applied by the Commissioner of Internal Revenue and by this and other courts in determining the sufficiency of a claim for refund. The requirement that "The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof" is manifestly no different from the principle applied in *Law Opinion 1116, supra,* and in the instant case by the Commissioner of Internal Revenue at the time he first rejected respondent's refund claim in April, 1926. It is true that in this decision the Commissioner of Internal Revenue used the word "must" rather than the word "should" as had been done in all prior regulations.[1] We do not think this

[1] In *Kings County Savings Institution* v. *Blair,* 116 U. S. 200, the Court stated that the Treasury regulations prescribing the forms and procedure for the refunding of taxes in

significant for the reason that the then long established practice and rulings of the Bureau of Internal Revenue clearly limited effective refund claims to those which did in fact contain language sufficient to reasonably indicate the subject matter, basis, or ground relied upon. This Court has since (1931) approved the administrative practice and held that it is in accordance with the express provisions of the statutes. *United States* v. *Felt & Tarrant Mfg. Company,* 283 U. S. 269, 272.

We are unable after investigation to discover any justification for the finding of the Court of Claims in *Magnolia Petroleum Co.* v. *United States,* 63 C. Cls. 173, 188, quoted on page 1 of respondent's supplemental brief. It is apparent from that opinion that this finding of fact was not material to the decision, which turned solely upon a question of law

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force from January 1, 1871, to December 31, 1878, were put in evidence, and quoted the following (apparently from such regulations):

"Claims for the refunding of taxes and penalties alleged to have been erroneously or illegally collected must be made out upon Form 46 in this case. *The burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath.*" (Italics ours.)

Substantially the same language as that which we have italicized has appeared continuously in the regulations of the Department:

United States Internal Revenue Regulations No. 14, Revised (Issued in 1916), p. 25; Regulations 33, Article 265; Regulations 45, Article 1036; Regulations 62, Article 1036; Regulations 65, Article 1306; Regulations 69, Article 1304; Regulations No. 74, Article 1254.

as to whether the interest provisions of the Revenue Act of 1921 or 1924 were applicable. The decision was reversed by this Court, 276 U. S. 160, and the case remanded because of "ambiguous findings" with instructions to the lower court to make definite determination of the controlling facts. There is attached hereto as Appendix C a letter from the Commissioner of Internal Revenue showing the past and present practice of the Bureau of Internal Revenue in its treatment of taxpayers' claims for refund. This letter squarely contradicts the finding of the Court of Claims to which reference is made in the preceding paragraph of this brief.

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In a brief *amici curiæ* in the instant case and in *United States* v. *Prentiss & Co., Inc.,* No. 234, and in *United States* v. *Memphis Cotton Oil Company,* No. 308, it is argued that there is but one cause of action to recover federal income taxes for a particular year and that this cause of action is for the overpayment of any sum wrongfully collected; that separate and distinct grounds for the overpayment do not constitute individual causes of action but are inseparable parts of an indivisible whole; that consequently having once set forth a cause of action generally in a claim for refund of an overpayment the taxpayer may subsequently shift the grounds of the demanded refund by adding new facts and reasons for the refunding of the tax paid; and that this may be done at the will of the taxpayer even

after the bar of the statute of limitations has fallen since the original refund claim timely filed stated the one and only cause of action.

This argument is based upon a misapplication of the analogy suggested by the Government between a refund claim and a declaration or petition filed in court. While, for certain purposes, it is undoubtedly proper to regard the overpayment of taxes for a given year as constituting a single cause of action, nevertheless the Revenue Acts permit recovery of only such part of the overpayment as is covered by a claim for refund. The "cause of action" asserted in a refund claim is, therefore, only that part of the total payment which is specifically described in the claim. And the Commissioner is not called upon to determine whether there has been an overpayment by reason of facts or upon legal grounds not set forth in the claim.

*Lorenzen* v. *United States,* 41 F. (2d) 369 (W. D. Mo.), affirmed 52 F. (2d) 106 (C. C. A. 8th), supports our view, although it involves an amended petition rather than an amended claim for refund. Plaintiff was suing to recover taxes on distilled spirits alleged to have been illegally collected. His original petition set forth one ground for recovery, which the court held invalid. After the statutory period for filing suit had expired, an amended petition was filed, asking for recovery on different grounds. It was held that the amended petition stated a "new and distinct cause of action" and

was barred by the statute. It would seem that on the theory advanced in the brief *amici curiae* the claim for recovery of the tax in the *Lorenzen case* would have constituted the one and only cause of action which should have been subject to amendment at any time. But the court held otherwise.

We submit that *Lewis* v. *Reynolds*, 284 U. S. 281, does not support the contention of *amici curiæ*. It is true that the ultimate question presented upon a claim for refund is whether the taxpayer has overpaid his tax and that the Commissioner may assert a deficiency as was done in the *Reynolds case* by way of set-off against an overpayment because only actual overpayments can be refunded. It is equally true, and well settled, that the Commissioner can not be compelled to redetermine the entire tax liability to the extent of allowing a refund predicated upon grounds not set forth in the claim. The *Reynolds case* holds merely that only an actual overpayment can be refunded and is no authority for the proposition that two grounds for refund constitute a single cause of action.

If the overpayment of taxes for a given year is to be regarded as the one and only cause of action with respect to a claim for refund then it would seem that it should be sufficient for the taxpayer to file a general refund claim stating merely that the tax for a designated year has been overpaid. We submit that the fact that this is not permitted by

the statutes is in the last analysis the complete and final answer to the argument advanced in the brief *amici curiæ*.

Respectfully submitted.

THOMAS D. THACHER,
*Solicitor General.*
CHARLES B. RUGG,
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GEORGE H. FOSTER,
JOHN A. REES,
H. BRIAN HOLLAND,
*Attorneys.*

DECEMBER, 1932.

## APPENDIX A

### *Treasury Decision 3240*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
*Washington, D. C.*

*To collectors of internal revenue and others concerned:*

Where any case in the Bureau of Internal Revenue has been finally closed after the taxpayer, or other party thereto, has had a hearing or has been afforded by written notice an opportunity to present oral or written arguments or statements of fact in support of his contentions, the case will not be reopened except (1) where a showing is made of new and material facts, accompanied by an explanation, satisfactory to the Commissioner of Internal Revenue of the failure to produce such facts prior to the closing of the case, or (2) where the case is materially affected by the change of regulations or by the final decision of another case either by the Commissioner of Internal Revenue or by a court of competent jurisdiction. The application for reopening a case should be addressed to the Commissioner of Internal Revenue, should state succinctly the facts and circumstances upon which the application is based, and must be supported by the affidavit of a person having knowledge of the facts.

This decision is not to be construed as modifying the regulations relating to the filing of claims in abatement or claims for refund, nor as denying the right of a taxpayer to a hearing or to an appeal at any stage of his case until the case has been finally closed. After the taxpayer has exhausted his remedies within the Bureau, however, and the case has been finally closed, it will be reopened only under the conditions stated in the decision.

D. H. BLAIR,
*Commissioner of Internal Revenue.*

Approved October 31, 1921.

A. W. MELLON,
*Secretary of the Treasury.*

## Appendix B

### *Treasury Decision 4265*

Treasury Department,
Office of Commissioner of
Internal Revenue,
*Washington, D. C.*

*To all collectors of internal revenue and others concerned:*

(1) Except as provided in paragraph (2), a refund or credit of any internal revenue tax will not be allowed in any case after the expiration of the statutory period of limitation applicable to the filing of a claim therefor (computed without regard to the filing of any so-called informal or defective claim) unless prior to the expiration of such period a formal claim has been duly filed which complies with all the requirements of the regulations applicable at the time such claim was filed, nor will any claim which does not comply with such regulations be considered for any purpose as a claim for refund or credit. (See e. g. Reg. 14; art. 1036, Reg. 45 and 62; art. 1306, Reg. 65; art. 1304, Reg.69; art. 1254, Reg. 74; Law Opinion 1116 (C. B. III–1, 350); T. D. 4625 (page 110, this Bulletin).)

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal

or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4625, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

D. H. BLAIR,
*Commissioner of Internal Revenue.*

Approved March 27, 1929.

A. W. MELLON,
*Secretary of the Treasury.*

## APPENDIX C

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

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TREASURY DEPARTMENT,
*Washington, December 12, 1932.*

Hon. CHARLES B. RUGG,
*Assistant Attorney General,*
*Department of Justice,*
*Washington, D. C.*

In re *U. S.* v. *Factors and Finance Company, Inc.*

SIR: During the argument of the above case in the Supreme Court on December 8, 1932, counsel for the respondent contended that the present position of the Government with respect to the amendment of claims for refund is inconsistent with the practice of the Bureau of Internal Revenue existing prior to the promulgation in 1929 of T. Ds. 4265 and 4266, C. B. VIII–1, p. 110.

It has been the consistent practice of the Bureau, at least since the approval of Solicitor's Law Opinion 1116, C. B. III–1, p. 350, to refuse to recognize the right of a taxpayer to amend a claim for refund after the statute of limitations had expired by adding grounds not previously stated. This law opinion was approved on April 30, 1923, though it

was not published until 1924. Prior to May 1, 1929, it was the practice of the Bureau to permit the amendment of informal claims for refund at any time. However, such amendments were permitted with respect to matters of form only. On March 27, 1929 T. D. 4266 was promulgated which required informal claims then on file to be amended on or before May 1, 1929, and thereafter to require all claims to conform strictly to T. D. 4265 which also took effect on May 1, 1929.

In a communication to the Secretary of the Treasury dated March 22, 1929, recommending the approval of T. Ds. 4265 and 4266, the then Commissioner of Internal Revenue stated that the purpose of these regulations was as follows:

> I am transmitting herewith for your approval two proposed Treasury Decisions relating to claims for refund.
>
> A large number of so-called "informal claims" for refund or credit of internal revenue taxes have been filed with the Bureau. Under an opinion of the Attorney General, which has been followed by the Bureau, the filing of these claims is sufficient to stay the statute of limitations and they may be perfected at any time. It is believed that this situation should be remedied by prescribing that, as a general rule, any claim which does not comply with the Regulations will not be considered as a claim for any purpose. The first proposed Treasury Decision adopts this general rule. In order to avoid harsh results, however, it also provides that any such claim might be perfected before May 1st of this year.

The second proposed Treasury Decision prescirbes the requirements of a formal claim. This decision does not materially change the present practice, but embodies that practice in formal Regulations.

Respectfully,

DAVID BURNET,
*Commissioner.*

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